

*United States Court of Appeals
for the Second Circuit*



APPENDIX

B
P/S
7cc

75-1007

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 75-1007

PATRICK J. McDONOUGH,

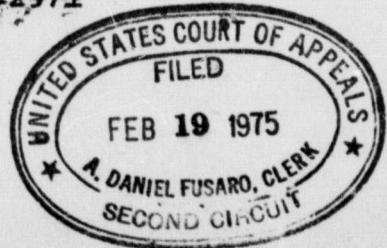
Appellant.

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel



PAGINATION AS IN ORIGINAL COPY

SECRET

NEAHER, J.

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.: Levin-Epstein

vs.

PATRICK J. McDONOUGH

For Defendant:

Did pass counterfeit obligations

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED		
		DATE	NAME	RECEIVED
Fine,		4/9/74	Lester J. Neaher	
Clerk,				
Marshal,		11/1/74	Lester J. Neaher	
Attorney,				
Commissioner's Court,				
Witnesses,				

UNITED STATES COURT OF APPEALS
FILED
JAN 8 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DATE

PROCEEDINGS

10/30/73	Before TRAVIA, J. - Indictment filed
11-9-73	Before NEAHER, J., Case called- Deft not present- Bench warrant ordered- Execution stayed to 11-13-73
11-14-73	Before NEAHER, J. - Case called- Deft arraigned and enters a plea of not guilty- Case adjd to 1-14-74 for status report
11-19-73	Govts Notice of Readiness for Trial filed.
12-5-73	Notice of Motion to dismiss the Indictment, etc. (Judge Neaher has papers)
12/27/73	Affidavit of Ethan Levin-Epstein filed.
1-14-74	Before NEAHER, J. - Case called- Deft and counsel present- Deft waived trial- Waiver signed- Deft's motion to dismiss pursuant to 6 month argued and denied- Trial ordered and begun-Trial contd to 1-15-74
1-14-74	Waiver of Trial by Jury filed

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DATE	PROCEEDINGS
1-15-74	Before NEAHER, J. - Case called - Deft and counsel present - Trial resumed Hearing on motion to suppress - Motion denied - Deft rests - Both sides rest Court finds deft guilty - Trial concluded
1-5-74	Before Neaher, J - case called - Bench Warrant ordered - Execution Stayed to April 19, 1974 at 11:30 am - adjd to 4-12-74 at 11:30 am. (for sentencing)
4-19-74	Before NEAHER, J - case called - deft & counsel S Chrein of Legal Aid present - Imposition of sentence is suspended and the deft is placed on 3 years probation. Clerk to file Notice of Appeal on behalf of the deft.
4-19-74	Judgment and Order of Probation filed - certified copies to Probation.
4-19-74	Notice of Appeal filed.
4-19-74	Docket entries and duplicate of Notice of Appeal mailed to the C of A.
4-30-74	Order received from court of appeals and filed that record be docketed on or before 5-9-74
5-9-74	Record on appeal certified and handed to Joan Gill for delivery to court of appeals
5-13-74	Acknowledgment received from court of appeals for receipt of record on appeal
5-23-74	Stenographers Transcript dated 1-14-74 and 4-19-74 filed
5-6-74	Voucher for Expert Services filed.
5-6-74	Stenographers transcript filed dated Jan. 14, 1974.
6-25-74	Supplemental record on appeal certified and handed to Joan Gill for delivery to court of appeals
6-27-74	Acknowledgment received from the C of A and filed for receipt of supplemental Index to Record.
7-18-74	Stenographers transcript filed dated Nov. 14, 1973.
10/31/74	Copy of Opinion and certified copy of Judgment received from court of and filed remanding case for a determination of whether Rule 5 exclusions under the Plan (prompt disposition of cases) apply (JN)
11/7/74	By NEAHER, J. - Memorandum Order filed that parties to above action are to appear before the court on 11/22/74 at 2:00 P.M. for the purpose of conducting evidentiary hearing (copies sent to parties)
1/22/74	Record and supplemental record on appeal received from court of appeals - Acknowledgment mailed
1/22/74	Before NEAHER, J. - Case called - Deft and counsel present - Hearing held - conc Court finds in favor of the Govt - Order to be submitted by the Govt after discussion with deft's attorney

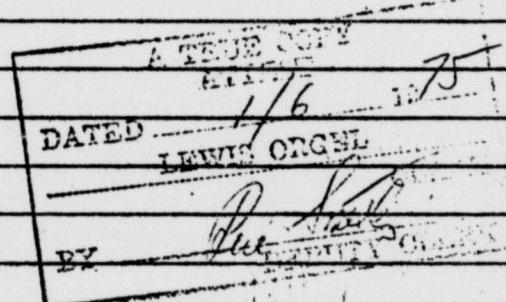
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CRIMINAL DOCKET

DATE

PROCEEDINGS

- 12/9/74 By NEAHER, J.- Judgment and Order of Probation filed- Imposition of sentence is suspended on counts 1 and 2 and the defendant is placed on 3 years probation, with credit for time on probation fro the date of the prior judgment herein
- 12-17-74 Notice of Appeal filed
- 12-17-74 Docket entries and duplicate of Notice mailed to C of A
- 1-6-75 Record on Appeal certified and handed to J. Gil for delivery to the Court of Appeals.



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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT ED. N.Y.

* OCT 30 1973 *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----- X
UNITED STATES OF AMERICA

TIME A.M. _____
P.M. _____

INDICTMENT

-against-
PATRICK J. McDONOUGH,
Defendant.
----- X
THE GRAND JURY CHARGES:

DOCKET 954

COUNT ONE

On or about the 13th day of May 1973, within the Eastern District of New York, the defendant PATRICK J. McDONOUGH, with intent to defraud, did keep in his possession and conceal three (3) counterfeit Ten Dollar (\$10.00) Federal Reserve Notes bearing serial number B36774803A, knowing the same to be falsely made, forged and counterfeited. (Title 18, United States Code, §472).

COUNT TWO

On or about the 13th day of May 1973, within the Eastern District of New York, the defendant PATRICK J. McDONOUGH, with intent to defraud, did pass, utter and publish three (3) counterfeit Ten Dollar (\$10.00) Federal Reserve Notes bearing serial number B36774803A, knowing the same to be falsely made, forged and counterfeited. (Title 18, United States Code, §472).

A TRUE BILL.

Robert A. Meehan, Esq.

FOREMAN.

Robert A. Meehan / Esq.

FILED
IN CLERK'S OFFICE
U.S. COURT OF APPEALS
UNITED STATES COURT OF APPEALS
OCT 3 1974 SECOND CIRCUIT

TIME 10 A.M. 1222 September Term, 1973.
P.M.
(Argued August 12, 1974) Decided October 3, 1974.)
Docket No. 74-1530

UNITED STATES OF AMERICA,

Appellee,

v.

PATRICK McDONOUGH,

Appellant.

B e f o r e :

OAKES, *Circuit Judge,*
FRANKEL and KELLEHER, *District Judges.**

Appeal from judgment of conviction entered in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, after order denying defendant's motion to dismiss the indictment for failure to comply with Rule 4 of the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases. The Government had filed its notice of readiness five days after the six month period under the Plan had expired.

✓ Remanded for a determination of whether any Rule 5 exclusions under the Plan apply.

* Of the Southern District of New York and Central District of California, respectively, sitting by designation.

PHYLLIS SKLOOT BAMBERGER (William J. Gallagher, The Legal Aid Society, New York, New York, of counsel), *for Appellant.*

ETHAN LEVIN-EPSTEIN, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York; Kenneth J. Kaplan, Assistant United States Attorney, of counsel), *for Appellee.*

PER CURIAM:

Before our recent *United States v. Flores*, No. 74-1186 (2d Cir. Aug. 7, 1974), slip op. 5145 (per curiam), Judge Neaher without hearing denied a motion to dismiss for failure to comply with Rule 4 of the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases (Plan).¹ Here the Government did not file its notice of readiness until five days² after the six month period had expired. The Government agrees that there should be a remand for an evidentiary hearing on whether any period of time was "excludable" under Rule 5 of the Plan. Thus, the result is easy enough: We remand.

We would add, however, a few words that may be helpful to Judge Neaher upon the remand. First, as we read *Flores*, slip op. 5150, there is no *de minimis* time period under the six months' rule; the Government "must be ready for trial within six months . . .," not six months and three

1 Rules 4 and 5 are reprinted in their entirety in *Flores*, slip op. 5146 n.1 and 5148 n.2. We incorporate those notes here by reference.

2 Judge Neaher apparently thought that the notice was filed on November 16, 1973, two days after the expiration, but the docket sheet and notice itself both show it was served on the Legal Aid Society on November 19, 1973.

days, four days, five days or nine days.³ This has to be the case since we are dealing with a clear line of time—much like a statute of limitations—marked for prophylactic purposes, not to be analogized to the equitable doctrine of laches. There are any number of “[e]xcluded periods” under Rule 5 of the Plan on which the Government may base a claim to toll the period, but the period itself is fixed, clearly, sharply and without qualification, at six months.

Nor by the appellant's waiving his right to a preliminary hearing before the magistrate under Fed. R. Crim. P. 5 does the Government become entitled to any extra time under the Plan; the critical time for commencement of the readiness period is “the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), *whichever is earliest.*” (Emphasis added.) All that waiver of a preliminary hearing does is relieve the Government from establishing probable cause; it has no bearing on the operation of the Plan.

All of this is not to say, of course, that the Government may not be able to find and prove at the hearing other operative facts entitling it to an “[e]xcluded period” under the Plan: a period during which appellant was cooperating with Government officials, *United States v. Valot*, 481 F.2d 22 (2d Cir. 1973); a period between the date of mailing

³ The total time periods involved in *Flores* before the Government filed its notice of readiness were four months and 27 days (from arrest on September 28, 1972, until dismissal on February 23, 1973, slip op. 5147) and 36 days (from reinstatement of indictment on June 19, 1973, until notice of readiness on July 25, 1973, slip op. 5148) or a total of four months and 63 days, *i.e.*, six months and *three* days. The case was remanded to determine whether the nine day period between reinstatement of indictment on June 19, 1973, and execution of the bench warrant for *Flores'* rearrest on June 28, 1973, resulted in delay to the Government, slip op. 5151-52, in the absence of which the indictment was to be dismissed with prejudice, slip op. 5152.

the notice of arraignment (November 5, 1973) and the date of arraignment (November 14, 1973), unless a "period of delay" under Rule 5(d) to the prosecutors did not result from the defendant's unavailability, *United States v. Flores*, *supra*, slip op. at 5151-52, or unless the defendant's unavailability occurred through the fault of the Government; or some other period as set forth in the Plan. *Id.* at 5152 n.4.

Judgment reversed and remanded.

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365-10-4-74 USCA-4081

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2 THE CLERK: Are these in evidence?

3 MR. LEVIN-EPSTEIN: Yes.

4 THE CLERK: All right.

5 Defendant's exhibits A and B now
6 marked in evidence.

7 (So marked)

8 MS. BAMBERGER: Thank you, your
9 Honor.

10 THE COURT: Are you desirous --
11 let me say has your attention been called
12 to the Calot case?

13 MS. BAMBERGER: Yes. I happened to
14 prepare it and try it in the court.

15 THE COURT: So you are aware that
16 the situation in that case came within the
17 meaning of exceptional circumstances. Namely,
18 a period during which Valot was apparently
19 doing things that the arresting agents con-
20 sidered to be a form of cooperation even
21 though it didn't produce anything.

22 MS. BAMBERGER: Yes your Honor.

23 THE COURT: Now, the Court there, and
24 I am quoting page 25 of 481 Fd. 2d: "We
25 hold that the situation presented by the facts

1
2 in this case comes within the meaning of
3 exceptional circumstances as that phrase
4 is used in 5(h)" which I understand is
5 the Government's position here. First, that
6 there was a period of time during which it
7 appeared to the agents and was accepted by
8 the United States Attorney --- a period cer-
9 tainly could be said --- on the basis of the
10 documents in the file --- could run from May
11 14 to June 8.

12 MS. BAMBERGER: If I may take exception
13 to your Honor's statement.

14 THE COURT: You believe there is no
15 terminal date shown.

16 MS. BAMBERGER: Yes. The only piece
17 of evidence showing a terminal date is Agent
18 Caputo's recollection through his testimony
19 that it ended some time during the first
20 week of June.

21 THE COURT: Isn't there corroborative
22 evidence in the file --- perhaps I misunderstood
23 --- but I thought June 8 --- that the period of
24 time when he was released for cooperation was
25 to be a period which was to terminate on June

1
2 8 with his reappearance in court for a pre-
3 liminary hearing.

4 MS. BAMBERGER: I had no impression
5 that was the situation. In fact it is my
6 understanding that the adjourned date of the
7 hearing was set at the time of the original
8 hearing so there would be no way of knowing
9 at that point when the cooperation would end
10 or if it would end or how long it would go on.

11 THE COURT: Well, I thought Mr. Stechel's
12 testimony was to the effect that he was released
13 on his own recognizance on May 14 with the idea
14 that he was going to be cooperating with a
15 Secret Service agent in attempting to do something
16 about tracing the source of the counterfeit bills
17 and that as part of that a further hearing was
18 set over; that is it was adjourned until June
19 8 and it would seem to me that that period of
20 time, at the very least, from May 14 to June 8,
21 would have been the anticipated period of cooper-
22 ation which may have been extended but apparently,
23 there is nothing extending it beyond that other
24 than Mr. Stechel's testimony that on September
25 18 he thought in his status memo that the

United States Attorney's criminal division
should check up on the status of this
cooperation. I am not extending it that far
but I am saying at the very least, I am sure
there must have been an appearance by Mr.
McDonough on June 8 at which time he arrived
at a preliminary hearing.

MS. BAMBERGER: That could have been
done without his presence. But it doesn't
seem to me there is any connection between
the agreement as testified to by Agent Caputo
and Mr. Stechel that on May 14 he would testify --
I am sorry -- that he would cooperate and
that they agreed to release him on a personal
bond of a thousand dollars to enable him to
cooperate and the June 8, 1973 date for the
hearing. There seems to be no basis in the
record for connecting the two. In fact, Mr.
McDonough was never incarcerated and no attempt
to increase the bond was made so it doesn't
seem to connect.

MR. LEVIN-EPSTEIN: I don't believe
Agent Caputo's testimony taken in connection
with Mr. Stechel's testimony shows a nexus as to an

1
2 agreed upon term of cooperation as it were.
3

4 THE COURT: No. I am simply saying
5 that coupling Agent Caputo's testimony with
6 a period of time I thought ended approximately
7 the first week in June -- I assume about the
8 June 8 date when a hearing was waived -- that
9 during that preliminary period cooperation was
10 going on and the Government wasn't pushing the
case simply because it was going on.

11 MS. BAMBERGER: The point I wish to
12 make is that the only piece of evidence which
13 goes in any way to establish that fact is
14 Agent Caputo's testimony.

15 There was no other evidence in the
16 record to establish the length of cooperation
17 period and my position was that I think Agent
18 Caputo's testimony with respect to the termina-
19 tion date of the cooperation period should
20 be rejected because while everything else --
21 because while the commencement of the coopera-
22 tion is reflected in many places, the termina-
23 tion is reflected nowhere -- not even by Agent
24 Caputo and it seems to me in light of the fact
25 there is no supporting evidence for this fact,

1
2 while there is for the other facts, would
3 indicate that perhaps, it didn't happen
4 that way.

5 MR. LEVIN-EPSTEIN: May I ask the
6 Court to consider this: If -- and I don't
7 mean to demean counsel's argument -- but if
8 what counsel says is taken to the logical
9 conclusion, we can only assume that Agent
10 Caputo lied on the stand and the cooperation
11 never occurred and if Agent Caputo was intent
12 on deceiving the Court as to a status of
13 cooperation, why, of all possible ways to
14 do it, would he say "I think it happened
15 about the first week of June," when he could
16 have said the man was cooperating right up until
17 the time the man was indicted?

18 He is not saying that. His recollection,
19 as clear as it can be a year and a half later,
20 is that the man cooperated for approximately
21 three weeks.

22 I believe when your Honor asked if it
23 was about the first week in June that the
24 cooperation ended, I believe he said, "I am
25 not sure but I believe it lasted for three weeks."

1
2 He could have said that though he
3 had no evidence of it he recollects that
4 it went on for four, five or six months.

5 He didn't say that, Judge.

6 THE COURT: There was another area
7 I was going to ask about and that was when
8 counsel was appointed or retained in this
9 case. Is there any indication of that?

10 MS. BAMBERGER: There is an indication
11 in the Legal Aid Society file that counsel
12 was appointed on the afternoon or at some
13 time after the arraignment before the magistrate.

14 THE COURT: On May 14?

15 MS. BAMBERGER: Yes.

16 THE COURT: In the afternoon?

17 MS. BAMBERGER: Yes.

18 But, as we tried to indicate previously,
19 that this contact, whatever it was, between
20 Agent Caputo and the defendant was unlawful
21 once counsel was assigned.

22 THE COURT: I have reflected on that
23 and I don't see that it has any bearing on
24 the issue here.

25 In other words, what you are referring

1
2 to is basically the so-called Messiah Rule
3 and the sanction for that would be the
4 elimination from any trial of any information
5 of an incriminating nature acquired by the law
6 enforcement people from the defendant as a
7 result of these improper contacts with him
8 but there is nothing of that nature here.

9 He supplied no information and as
10 far as I am aware, no one ever suggested at
11 the time of trial, that anything had to be
12 suppressed because of that.

13 Moreover, it could be argued here that
14 the issue being explored is not one of guilt,
15 but public interest underlying the six month
16 Rule to determine whether or not there was an
17 excludable period of time during which an
18 indictment is either valid or invalid at
19 the time of trial and I would think that any
20 evidence bearing on that score would be
21 acceptable on that issue since the guilt of
22 the defendant is not an issue but only the
23 validity of the indictment.

24 I was asking when counsel came in as
25 to whether there was a period of time when he

1
2 was unrepresented but I take it he was actually
3 represented from May 14.
4

5 MR. LEVIN-EPSTEIN: Apparently. The
6 Legal Aid Society folder reflects he was
7 appointed counsel on the actual date of arraign-
8 ment.

9 THE COURT: I suppose the burden is
10 on the Government to establish this but I have
11 heard nothing to controvert the agent's testi-
12 mony that it was a three week period so I can
13 only reject that testimony if I have reason to
14 disbelieve it and I can't say that I see any
15 reason to disbelieve it.

16 In fact, I am strongly of the view that
17 there are corroborating circumstances and that
18 it lasted at least from the time of his arrest
19 to the time of the waiver of hearing on June the
20 8th and I am also of the opinion that there was
21 an additional period of excludable time by
22 virtue of this difference in address.

23 The man obviously had two different
24 addresses and there was certainly understandable
25 confusion, particularly when it now appears --
I am sure there would be no question about it

1
2 and the Court can safely accept the --
3 that the information sheet taken at the
4 time of his first appearance before the
5 magistrate stated that the address was the
6 Newbridge Road address and surely, the United
7 States Attorney is permitted to rely on the
8 magistrate's address as given by the defendant.
9

10 That the agent's report indicates that
11 he sometimes resided at another address be-
12 lieved to be the address of his brother and --
13 married brother and wife -- does not overrule
14 the propriety of the circumstances that the
15 defendant gave an address as his own.

16 So, I am of the view that the Government
17 satisfied the Court that there was an excludable
18 period of time from May 14 to June 8 and an
19 additional five days due to the Government's
20 inability to bring about the arrest of the
21 defendant which I can't attribute but to the
22 fault of the Government.

23 MS. BAMBERGER: Your Honor, I believe
24 that the Second Circuit reversed and remanded
25 the judgment of conviction and it is merely
a technicality, but I think your Honor --

1
2 we ran into this problem with the Second
3 Circuit --

4 THE COURT: I welcome your suggestion
5 because it is a new one to me.

6 MS. BAMBERGER: If the Government and
7 your Honor will agree I will prepare a new
8 form of judgment.

9 THE COURT: Let me call your attention
10 to the language of the opinion.

11 It does say, "That the judgment is
12 reversed and the action is remanded to the
13 District Court for further proceedings in
14 accordance with the opinion of the Court" and
15 the opinion, in substance, is for a determina-
16 tion as to whether any Rule 5 exclusions under
17 the plan apply and I find, as a result of the
18 hearing, that there are two periods of exclu-
19 sions applying to this indictment; namely,
20 a period of three weeks from May 14 to June
21 8 under Rule 5(h) of this District plan and
22 a further period of five days from November
23 9 to November 14, the date of his actual
24 arraignment under Rule 5(d) of the plan.

25 So, I have made the determination

1
2 therefore, that there would be roughly a
3 period of some 26 days if one includes Satur-
4 days and Sundays in three weeks of exclusions
5 by reason of the evidence I have heard and
6 seen.

7 So now I suppose however, that a new
8 judgment of some kind --

9 MR. LEVIN-EPSTEIN: Perhaps your Honor
10 the best way to --

11 THE COURT: Assume a new judgment of
12 some kind has to be intered since the mandate
13 of the Court does recite that the judgment is
14 reversed.

15 MS. BAMBERGER: The form that we used
16 in U.S. v. Flores --

17 THE COURT: Is there something you
18 did in that case?

19 MS. BAMBERGER: Yes.

20 It indicated that the defendant was
21 found guilty and that his sentence was imposed
22 nunc pro tunc to the day of the original judg-
23 ment and I can submit to Mr. Levin-Epstein a
24 copy of that and if agreeable to that, we can
25 submit it to your Honor.

1
2 MR. LEVIN-EPSTEIN: I would like
3 that, your Honor. I would like to confer
4 with Mr. Bergman of our appeals section.
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CERTIFICATE OF SERVICE

February 19, 1975

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Michael P.A.Y.